

Pages 1 - 33

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES DONATO, JUDGE

In re FACEBOOK BIOMETRIC)
INFORMATION PRIVACY LITIGATION) Master File No.
_____) 15-cv-03747 JD

San Francisco, California
Wednesday, December 16, 2015

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

ROBBINS GELLER RUDMAN & DOWD LLP
One Montgomery Street, Suite 1800
San Francisco, California 94104
BY: SHAWN A. WILLIAMS, ATTORNEY AT LAW

LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005
BY: JOEL H. BERNSTEIN, ATTORNEY AT LAW

EDELSON PC
350 North LaSalle Street, Suite 1300
Chicago, Illinois 60654
BY: ALEXANDER NGUYEN, ATTORNEY AT LAW

(Appearances continued on next page)

Reported By: *Katherine Powell Sullivan, CSR #5812, RPR, CRR*
Official Reporter - U.S. District Court

APPEARANCES (CONTINUED):

For Defendant:

MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
BY: LAUREN R. GOLDMAN, ATTORNEY AT LAW

MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
BY: ARCHIS A. PARASHARAMI, ATTORNEY AT LAW

MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, California 90071-1503
BY: JOHN NADOLENCO, ATTORNEY AT LAW

Wednesday - December 16, 2015

10:25 a.m.

P R O C E E D I N G S

---000---

THE CLERK: Calling civil 15-3747, In Re Facebook Biometric Information Privacy Litigation.

Counsel, please come forward and state your appearances for the record.

MR. WILLIAMS: Good morning, Your Honor. Shawn Williams on behalf of Nimesh Patel.

MR. BERNSTEIN: Good morning, Your Honor. Joel Bernstein on behalf of plaintiffs.

MR. NGUYEN: Good morning, Your Honor. Alex Nguyen on behalf of the plaintiffs.

MS. GOLDMAN: Good morning, Your Honor. Lauren Goldman from Mayer Brown on behalf of defendant Facebook.

MR. PARASHARAMI: Good morning, Your Honor. Archis Parasharami from Mayer Brown on behalf of defendant Facebook.

MR. NADOLENCO: And good morning, Your Honor. John Nadolenco, also of Mayer Brown, on behalf of Facebook.

THE COURT: Okay. Who's going to take the lead for the plaintiffs?

MR. NGUYEN: That's me, Your Honor.

THE COURT: All right. Mr. Nguen, tell me -- I'm having a little trouble following this -- what is your dispute about the enforceability of the SRR?

1 **MR. NGUYEN:** Your Honor, I'm sorry, I didn't hear.

2 **THE COURT:** Enforceability of the SRR that Facebook
3 says it requires all of its users to accept.

4 **MR. NGUYEN:** Yes, Your Honor.

5 Essentially, the terms -- Facebook's argument requires the
6 Court to credit outside the records facts which Facebook isn't
7 even sure about.

8 They say "on information and belief" that whoever signed
9 it for Facebook would have agreed to those terms. And they
10 asked the Court to draw unwarranted legal inferences from --
11 from those outside-the-record materials.

12 And so, at this point in the case, Your Honor, it's a
13 burden of Facebook to show that the terms which the complaint
14 doesn't rely on, doesn't cite, and we also dispute, essentially
15 how those terms would have been presented to the user.

16 So in order --

17 **THE COURT:** Are you arguing that there's some fact
18 dispute about whether every Facebook user agrees to these
19 terms?

20 **MR. NGUYEN:** Your Honor, on the record before the
21 Court, the complaint says specifically that the plaintiffs did
22 not consent to have their biometric data taken. And, also, we
23 don't know --

24 **THE COURT:** By the way, why isn't that enough to
25 incorporate the SRRs by reference?

1 I mean, you say they didn't consent. The consent document
2 is the SSR.

3 You all struggled mightily to avoid mentioning the SRR. I
4 get that. But when you say things like, "Well, we never told
5 Facebook," aren't you by implication referencing the SSR? And
6 can't I now rely on it by incorporation?

7 **MR. NGUYEN:** No, Your Honor. This case is about the
8 statutory violations completely separate from the SSR which
9 essentially governs the plaintiffs -- it describes the use of
10 the Facebook.

11 **THE COURT:** I know that. But you do say the
12 plaintiffs did not consent. You're preempting what might be a
13 defense under the BIPA. Consent is a defense under the BIPA.
14 Or part of a defense.

15 So you're saying they didn't consent. Well, the only way
16 to say they didn't consent is to look at their terms of
17 agreement in this case, the SRR with Facebook.

18 So why have you not at least implicitly incorporated those
19 into the complaint?

20 **MR. NGUYEN:** Because the consent that we're talking
21 about in the complaint deals with the statute. BIPA is an
22 informed consent statute.

23 So this is a statutory case, Your Honor. The plaintiffs
24 did not consent to have their biometric information taken from
25 them. So it's not --

1 **THE COURT:** Listen. We're going to get to BIPA later.
2 Right now I'm just looking at whether you made enough of a
3 reference to the SSR, covertly and inferentially, to bring it
4 in.

5 And I'm not hearing you tell me why you didn't. You're
6 saying, "We didn't consent. We didn't consent. BIPA consent
7 is different."

8 That may all be true. But isn't the starting point: What
9 did you actually say as a user to Facebook what Facebook could
10 do? So that's the SRR; right?

11 **MR. NGUYEN:** In the cases that Facebook has cited, the
12 *C.M.D.* case and the *Song fi* case, for example, the contract or
13 the terms were made explicitly part of the complaint. And they
14 were quoted as part of the complaint. The causes of action
15 involved things like breach of contract or other causes of
16 action that emanate from that particular complaint.

17 This case is completely different. The complaint does not
18 at all rely on the terms. It does not cite the terms. And we
19 dispute to the extent there is any authenticity.

20 So, in other words, Your Honor, in this case, which is a
21 purely statutory violation, we do not cite the complaint. And
22 this is not a result of clever drafting, Your Honor. This is
23 about a specific statutory violation.

24 And so that's distinguishable from other cases which
25 Facebook has cited, like the *C.M.D.* or the *Song fi* case, which

1 explicitly rely and quote from --

2 **THE COURT:** All right. I appreciate that.

3 Let me ask you this: So you're contesting your clients
4 ever agreed to the SRR?

5 **MR. NGUYEN:** Yes, Your Honor.

6 **THE COURT:** All right. Even that baseline
7 proposition, you contest that they ever agreed to the SRR?

8 **MR. NGUYEN:** Your Honor, the -- Facebook itself isn't
9 sure how the consent would have happened. And consent --

10 **THE COURT:** I'm talking about you. You on the
11 plaintiffs' side. You contest your clients, all three of them,
12 all the lead clients here, you're saying that you all dispute
13 that they signed or agreed to the SRR?

14 **MR. NGUYEN:** Your Honor, what I can represent to the
15 Court is that the plaintiffs don't have a recollection of
16 having agreed to -- to the SRR at issue in this case. So they
17 don't remember --

18 **THE COURT:** That's not helping.

19 Look. You've raised a contract formation defense to this
20 motion, okay. You've said, Judge, you can't pull the trigger
21 on this because the contract was never formed binding us to
22 California choice of law.

23 That's one of your arguments; right?

24 **MR. NGUYEN:** Correct.

25 **THE COURT:** All right. So tell me what -- don't tell

1 me the clients don't remember. Just tell me what the legal
2 claim is. "Your Honor, here's an example." Maybe this isn't
3 what you're saying. Say whatever you want. This is just an
4 example. "Your Honor, we deny that the SRR is enforceable
5 because, one, our clients never signed it; two, it's
6 unconscionable." Whatever it is. Just lay it out for me
7 because I couldn't get it clearly in your briefs okay.

8 **MR. NGUYEN:** All right. Okay, Your Honor. What
9 we're -- what we're arguing in our contract formation argument
10 is, number one, Facebook is not -- the contract at issue, and
11 they are multiple which they attached, is not properly before
12 this court at this stage in the proceedings. That's the first
13 argument.

14 The second argument is that Facebook, based on information
15 and belief is -- cannot show that the plaintiffs assented to
16 the choice of law provision because that's a factually heavy --
17 that's a factually dependent dispute hinging on a number of
18 things: How it was presented; where; whether it was clicked
19 on; whether hyperlinks worked; et cetera.

20 The third argument on the contract formation is that even
21 if Facebook is able to show assent, the choice of law provision
22 in this case is completely independent from the statutory claim
23 in this case.

24 So the restatement that they cite --

25 **THE COURT:** Just look at the formation issue. All

1 right. So there's no assent. And it's outside the complaint.
2 Focus on this issue.

3 **MR. NGUYEN:** Right.

4 **THE COURT:** What else on the formation issue? Is it
5 unconscionable? Did you argue that? You had a couple of
6 passing references. I wasn't clear whether you were really
7 saying it or not.

8 **MR. NGUYEN:** Right. It's unconscionable in the sense
9 that -- it's procedurally unconscionable in the sense that it's
10 a --

11 **THE COURT:** Let me step back. When you say
12 "unconscionable," what body of law are you invoking?
13 California law or Illinois law?

14 **MR. NGUYEN:** California law, Your Honor.

15 **THE COURT:** California law.

16 So you agree that the enforceability of the contract
17 should be tested under California law. Plaintiffs agree with
18 that?

19 **MR. NGUYEN:** Well, Your Honor --

20 **THE COURT:** Counsel, just take a position. It's yes
21 or no. I'm just asking you to move this thing along.

22 **MR. NGUYEN:** Yeah.

23 **THE COURT:** What body of rules am I, at your proposal,
24 going to follow? You propose that for all these contract
25 formation issues and whether the SRR is enforceable, California

1 law provides the rule of the day; right?

2 **MR. NGUYEN:** Yes, Your Honor.

3 **THE COURT:** California. Yes?

4 **MR. NGUYEN:** I believe so.

5 **THE COURT:** You said yes. So you're going to live
6 with that, okay.

7 All right. So California law is going to provide the rule
8 of decision pursuant the plaintiffs. I'll get to the
9 defendants in a minute.

10 Now, under California law are you arguing that the choice
11 of law provision is unenforceable because it's unconscionable?

12 **MR. NGUYEN:** No, Your Honor. That's part of our
13 fundamental public policy argument.

14 **THE COURT:** Take it one step at a time. Are you
15 attacking the SRR and specifically the choice of law provision
16 as being unconscionable?

17 **MR. NGUYEN:** Not as being substantively
18 unconscionable.

19 **THE COURT:** Well, you have to have both in California,
20 procedural and substantive. If you're going to give up on one,
21 you're giving up on all, is my understanding, okay.

22 **MR. NGUYEN:** Correct, Your Honor.

23 **THE COURT:** So there's no unconscionability challenge
24 to the SRR or the choice of law term --

25 **MR. NGUYEN:** Correct.

1 **THE COURT:** -- right?

2 Okay. All right. Let me hear from the defendants.

3 You can stay there, Mr. Nguyen. You can stay there.

4 **THE COURT:** All right. Ms. Goldman.

5 **MS. GOLDMAN:** Yes, Your Honor.

6 **THE COURT:** You agree California law governs the
7 enforceability and formation questions?

8 **MS. GOLDMAN:** Yes.

9 **THE COURT:** Now, I have to say, I'm not uncomfortable
10 with taking judicial notice in the right circumstances. But
11 this is a much more detailed factual attack on the SRR than I'm
12 comfortable resolving on judicial notice. I can't see it.

13 Your counsel is right. For whatever reason, it is not
14 clearly referenced in the complaint. There may a little bit of
15 an inferential hook, but it's rather thin.

16 And there are just too many things here on assent and
17 enforceability, and all the other issues we touched on, to let
18 me comfortably say this is something easily verifiable by ready
19 turn to something outside the courtroom.

20 So why am I wrong?

21 **MS. GOLDMAN:** Because, Your Honor, plaintiffs have
22 never disputed assent. And they have never disputed
23 enforceability.

24 Counsel was just asked to say on what grounds plaintiff
25 disputes --

1 **THE COURT:** It's in the opposition. They said they
2 never agreed to this.

3 **MS. GOLDMAN:** No. They said they never agreed to have
4 their faceprints taken by Facebook.

5 He did not say, "We did not sign up for the contract." He
6 did not say, "We are the only people who have managed to sign
7 up for and use Facebook without agreeing to its terms." Terms
8 which have one --

9 **THE COURT:** I don't think that's right. The
10 midsection of their brief says, "We never agreed to the choice
11 of law. We were never asked to agree. It was hidden." He has
12 given up on unconscionability, so you don't have to worry about
13 that.

14 I mean, there's a whole thing in here about, "We were
15 duped and misled into choosing California law, and we didn't do
16 that." And that's clearly a formation issue.

17 **MS. GOLDMAN:** It's really not, Your Honor, because
18 when we -- when plaintiffs filed these cases in Illinois, we
19 moved to transfer the cases to California under the foreign
20 selection clause in the SRR, which appears in the same
21 paragraph of the SRR as the choice of law clause that we are
22 now invoking. Plaintiffs looked closely at our motion and then
23 they stipulated to transfer the cases to this court.

24 The cases came to this court. They filed their amended
25 complaint. The amended complaint says that each of the

1 plaintiffs has an active Facebook account, but doesn't respond
2 at all to our showing that everybody who has an active Facebook
3 account agreed to Facebook's terms both as a condition of
4 opening that account and as a condition of using the account.

5 Under Rule 201, under the incorporation by reference
6 doctrine, the Court can take judicial notice of facts that are
7 not reasonably subject to dispute. This is really plain and
8 simple.

9 **THE COURT:** I really don't see that here because
10 section B of their argument is Facebook fails to establish that
11 plaintiffs assented to its choice of law clause.

12 That is not resolvable by judicial notice. What am I
13 taking judicial notice of? That the plaintiffs assented? They
14 say they didn't. Now, whether they have a good argument or a
15 bad argument remains to be seen. But in that context, judicial
16 notice just doesn't work.

17 Now, if you're saying that they made some kind of
18 admission in agreeing to venue the case here, you know, tell me
19 more about that because I don't see that in the papers.

20 **MS. GOLDMAN:** The stipulation did not exceed the
21 enforceability of the contract. But surely, Your Honor, if
22 they had facts to dispute, to suggest that they alone, among
23 Facebook's users, somehow signed up for and used the service
24 without agreeing to the terms, they presumably would not have
25 stipulated to transfer, which was pursuant to those terms. And

1 they presumably would have put those facts in their complaint
2 or in their opposition to the judicial notice or in their
3 brief.

4 And they've never alleged any facts. They never said,
5 "Well, the print was too small."

6 **THE COURT:** I don't think they need to plead in an
7 anticipatory fashion, "And, oh, by the way, the SRR doesn't
8 apply." They don't need to do that. That's not their case.
9 The case is you broke the law in Illinois.

10 And, by the way, the weight of authority is against you on
11 this, rightly or wrongly. But when people challenge the
12 Court's reliance on judicial notice proposals because there are
13 disputed issues of fact, most courts say, "I can't consider
14 it."

15 This is a 12(b)(6) motion, okay. This is the start of the
16 case. You're asking me to make a whole bunch of fact findings
17 about what these specific plaintiffs did; what they understood;
18 what they agreed to; what they didn't agree to.

19 The plaintiffs have said, "We dispute all that. We think
20 Facebook is wrong. There's no way they are going to be able to
21 show this."

22 So my inclination is to give you a choice. And we can
23 talk about this. I am not going to proceed under a 201
24 judicial notice approach or incorporation by reference. There
25 just is not enough here for that to happen.

1 However, I will give defendants the initial opportunity to
2 make a choice. You've got two arguments here attacking the
3 complaint.

4 Now, if you want to press the "California law prevails"
5 argument, I can get you to early summary judgment. We can do
6 it in January. All right.

7 So plaintiff is going to be put to the test. They said
8 they've got a bunch of facts saying, "We never agreed." Now,
9 they will have the opportunity to show that at summary
10 judgment.

11 And we can put this issue to rest. That is the only
12 vehicle I can see to get to the information that I would need
13 to resolve a fact dispute.

14 So what do you think about that?

15 **MS. GOLDMAN:** Well, we think that the Court does not
16 need to even reach any of this because it is so clear that the
17 plaintiffs haven't stated a claim under the Illinois statute
18 that they've cited.

19 **THE COURT:** In that case you can, you know, withdraw
20 the California argument. Or I can deny it. Do you want to
21 withdraw it?

22 **MS. GOLDMAN:** I'd like to confer with my co-counsel.

23 **THE COURT:** It's withdrawn without prejudice. You can
24 renew it after the facts develop. Under the 12(b)(6) stage I
25 can't grant it because there are too many fact issues.

1 **MS. GOLDMAN:** We understand, Your Honor.

2 We'd like to have a sense of how the Court plans to rule
3 on the rest of the motion before we decide whether or not to
4 withdraw that argument.

5 **THE COURT:** Well, initially, I have to say I thought
6 we can just reach the BIPA. But I'm -- it's kind of wasteful,
7 from an efficiency perspective, to do that and then have you
8 all come back in two months and say on summary judgment, "Oh,
9 we never agreed to this, and California law, in fact,
10 prevails." Or "We did agree to it, and California law
11 prevails." In other words, some development that that actually
12 undercuts any Illinois state law ruling because, all the
13 sudden, it turns out California is, in fact, the order of the
14 day.

15 **MS. GOLDMAN:** Understood, Your Honor.

16 **THE COURT:** Do you understand what I'm saying?

17 **MS. GOLDMAN:** Yes, I do.

18 **THE COURT:** Go ahead, Mr. Nguyen.

19 **MR. NGUYEN:** Thank you, Your Honor.

20 In our brief we lay out, really, regardless of whether or
21 not plaintiffs agreed to the choice of law provision in the
22 SRR, the Court should still apply Illinois law for fundamental
23 public policy reasons. So --

24 **THE COURT:** But that's not the point.

25 The point is if it turns out later that Facebook is right

1 and California law prevails, I don't want to go through a whole
2 thing on Illinois law when it turns out California law is the
3 trump card. It's a waste of time and borders on being an
4 advisory opinion. It's not worth your clients' money, the
5 defendant's money, or the Court's resources.

6 That's the issue. Do you understand what I'm saying?

7 **MR. NGUYEN:** I do, Your Honor.

8 **THE COURT:** There is no doubt in my mind Facebook is
9 going to come back -- this is just me talking -- and say in two
10 months, "Here are the facts to show that California law
11 governs."

12 I don't want to spend all this time in a matter of first
13 impression in Illinois state law, a state 2,000 miles away from
14 here, that I'm not even in, opining about their privacy
15 statutes when I don't need to and maybe shouldn't have because
16 Illinois law doesn't apply.

17 So I'm trying to get you to tell me: Why should we not
18 put this on hold and go to a contract formation early summary
19 judgment? You say you have facts that are going to kick the
20 SRR to the curb. You should be chomping at the bit to show
21 that to me.

22 **MR. NGUYEN:** Yes, Your Honor.

23 What we're saying, Your Honor, is that under restatement,
24 which is the heart of the case, Illinois fundamental public
25 policy governs here because, as the Court can see and as we

1 cited --

2 **THE COURT:** You're asking me to do a choice of law
3 provision analysis without having shown me that there's any
4 conflict in the laws yet, because nobody has committed to which
5 law applies.

6 I only do the choice of law when you say Illinois and the
7 defendant says California and there's a legitimate basis for
8 that.

9 Right now you say, "We can't say California because
10 there's a whole series of fact disputes that cannot be resolved
11 in a 12(b)(6) motion." That is your argument. And I'm saying,
12 okay, let's go forward on early summary judgment and get that
13 resolved. Then we can see where we are.

14 It may be that California law applies. In which case it
15 will be probably not so hard to get rid of the Illinois claim.
16 I don't know that, but that seems like the way it would turn
17 out.

18 Now -- or it may be that California law applies, but
19 Section 187 of the restatement and those tests say,
20 nevertheless, Illinois should still be the order of the day.
21 Or it may be California doesn't apply and goes forward.

22 But there is at least one scenario where California
23 applies and Illinois does not get a voice. And in that
24 situation, I am concerned about burning a lot of time on
25 Illinois until we figure out whether California is in play or

1 not. That's all that I'm saying.

2 Okay. So why not just do summary judgment at the end of
3 January? This is an easy issue. Your clients are going to
4 say, "I did this, this and this when I signed up. I never saw
5 X. I never saw Y. I never saw Z. And Facebook never told me
6 anything about it." And Facebook will say, "Here's what we do.
7 You can't use this service unless you click. We have a record
8 of the click." Whatever it is.

9 This is not hard. It really isn't. This comes up in
10 almost every Internet dispute where somebody says, "I'm not
11 bound by the terms of service." Okay. But this is early.
12 It's just 12(b)(6). I can't just reach out and, you know, run
13 glibly through the facts.

14 I have to have the foundation either in the complaint --
15 which I don't because you all dispute it on the plaintiffs'
16 side, which is perfectly your right -- or I have to have a
17 basis in fact based on material from outside the record, which
18 I can only handle, unless you two tell me differently, under
19 Rule 56. That's where we are.

20 **MS. GOLDMAN:** May I have a moment to confer with my
21 colleagues, Your Honor?

22 **THE COURT:** You're the lead counsel, Ms. Goldman.

23 **MS. GOLDMAN:** I understand.

24 **THE COURT:** Just tell me what you want to do.

25 **MS. GOLDMAN:** Well, Your Honor, it's our position that

1 plaintiffs, like everybody else, clearly signed up for the --
2 for the terms when they signed up for Facebook accounts and
3 when they continued to use them.

4 The Court can take judicial notice of Facebook's rights
5 and responsibilities which is on the website. The website is
6 massively invoked throughout plaintiffs' complaint.

7 **THE COURT:** Okay. But those are all dealing with fact
8 issues. I'm not going to do it your way. So just tell me what
9 you would like to do.

10 **MS. GOLDMAN:** And the Court will not rule on the
11 statutory claim until --

12 **THE COURT:** No, that part we're discussing. So tell
13 me, I'm asking both of you -- look. I'm just asking two
14 things, okay. Do you want to go to summary judgment on the
15 formation issues? I can do that in January. It is an easy
16 thing to do. And you all can be amply ready for it. It's just
17 not that hard. We can do it that way.

18 Step one can be: Are plaintiffs subject to the SRR and
19 the choice of law clause? Okay. After that we can continue
20 this discussion about is California or Illinois going to govern
21 the outcome of the case. Maybe California law does. Maybe
22 Section 187 says no, Illinois has a fundamental policy, and we
23 go there.

24 All right. What I do not want to -- this is the third
25 time I've said it. Please, if you're not following it, tell

1 me.

2 What I do not want to do is have you and the Court spend a
3 lot of time on Illinois and then somebody comes back in April
4 and says you can't use Illinois law because of X, and that
5 turns out to be right.

6 **MS. GOLDMAN:** Understood, Your Honor. We --

7 **THE COURT:** That's the point that I want to avoid.

8 Let's just talk here among friends. This is nonbinding.
9 How would you two like to manage this case?

10 Let me start with Mr. Nguyen.

11 **MR. NGUYEN:** Our position, Your Honor, is that the
12 Court should proceed on the entire case because the case is
13 fairly limited. There are two arguments with respect to
14 whether or not BIPA applies. And that is, number one, the
15 fundamental public policy which we have cited in our briefs and
16 which the defendant has opposed under the restatement would
17 mandate that Illinois law applies.

18 The second argument, which is -- an argument is that the
19 plaintiffs in this class that Facebook has failed to meet its
20 burden to show that plaintiffs have agreed to the terms of the
21 service. But even if they did, our position is going to be
22 that fundamental Illinois public policy, which we have cited as
23 being in the Constitution in the legislation, and the statutory
24 structure in Illinois would still apply.

25 So our preference, Your Honor, would be for the Court

1 to -- rather than do it piecemeal on the question that will not
2 settle the case, to do it all at -- all at once.

3 **THE COURT:** If California law applies exclusively, how
4 can you have an Illinois state law claim?

5 **MR. NGUYEN:** Because, Your Honor, under the
6 restatement, as long as the plaintiff can show that fundamental
7 public policy --

8 **THE COURT:** What if I reject that? What if I find --
9 what I'm saying is, if I find California law governs and you do
10 not come within the exceptions of the restatement, that kills
11 your case. You're finished. That's my point. There is a
12 potential dispositive outcome on choice of law. You keep
13 telling me there isn't, but that's wrong.

14 You say, "You're going to see it my way on public policy."
15 That's not guaranteed.

16 **MR. NGUYEN:** I understand that, Your Honor.

17 **THE COURT:** Maybe I will. I don't know.

18 So that is a cutoff. It's a hard stop in the case. And
19 that's what I'm concerned about.

20 Now, I don't know if it's a 5 percent possibility or a 95.
21 I just don't know. But we're talking aloud here about how to
22 handle that eventuality.

23 **MR. NGUYEN:** Right.

24 **THE COURT:** Just to be crystal clear for the fourth
25 time, I do not want to go down this path and then have that

1 5 percent or 95 percent opportunity manifest itself, and it
2 turns out all of this work on Illinois was for nothing because
3 public policy, or whatever, says Illinois law just doesn't
4 apply. Okay. That's what I'm saying.

5 **MR. NGUYEN:** Yes, Your Honor.

6 **THE COURT:** I'm going to give the defendant one last
7 chance. What would you like to do?

8 **MS. GOLDMAN:** We agree with you, Your Honor. We view
9 this as a threshold issue. We do not believe that plaintiffs
10 will be able to show that they did not assent to the terms.

11 We think it is an easy thing for us to show that they did
12 assent and those terms are enforceable; that there is no public
13 policy concern; and that California law should carry the day
14 under the restatement. So we agree that the Court should
15 proceed with that as a threshold issue.

16 **THE COURT:** Mr. Nguyen.

17 **MR. NGUYEN:** Your Honor, again, I preference it's
18 going to be that the Court take it up all at once, also,
19 because the discovery that would be involved in showing the
20 fundamental public policy portion of it and for the Court to
21 reach the merits on that isn't going to be that --

22 **THE COURT:** That's a legal issue. Why would there be
23 any fact discovery on whether this is a fundamental public
24 policy? What's that going to be?

25 **MR. NGUYEN:** There isn't. That's why I think, Your

1 Honor, that the Court can -- can decide both those issues right
2 now.

3 **THE COURT:** All right. Here's what we're going to do:
4 Plaintiffs have put formation of the contract, assent,
5 other essential issues into dispute.

6 Those are not disputes I can resolve within the confines
7 of the 12(b)(6) motion or on the face of the complaint. And
8 request for judicial notice and incorporation by reference just
9 goes too far, in my view.

10 So we will set a half-day evidentiary hearing on the
11 formation and assent issues for January.

12 I don't think I have -- Lisa, what is the third Monday in
13 January?

14 **THE CLERK:** It's a Holiday.

15 **THE COURT:** How about Tuesday? What is that? The
16 19th?

17 **THE CLERK:** Yes, the 19th.

18 **THE COURT:** How about January 19th?

19 **MS. GOLDMAN:** Your Honor, I have a trial beginning in
20 federal court in Massachusetts on January 25th. And I believe
21 that we have some pretrial hearings scheduled for the week
22 before that. Is there any way we could put this off until the
23 middle of February?

24 **THE COURT:** That's a little far down the road. You
25 have other colleagues.

1 **MS. GOLDMAN:** Understood, Your Honor.

2 **THE COURT:** Actually, you probably want to do a little
3 discovery before this; is that right? Both of you?
4 Mr. Nguyen?

5 **MR. NGUYEN:** Yes, Your Honor.

6 **MS. GOLDMAN:** Yes.

7 **THE COURT:** In that case, why don't we set it for --
8 is Monday the 30th -- what's the first Monday in February?

9 **THE CLERK:** The 1st.

10 **THE COURT:** We'll set it for February 1st, all right.

11 So you all tee up whether or not the SRR has been assented
12 to. And if there are any specific issues for the choice of law
13 provision that for some reason have other unique factual
14 components, bring those up as well. All right.

15 I will promptly decide after that. And then we will go to
16 the issue of if California law applies, whether 187 public
17 policy exceptions suggest that I should, nevertheless,
18 disregard that choice of law term and apply Illinois.

19 **MS. GOLDMAN:** Will that lateral legal issue, Your
20 Honor, be decided at this hearing on the 1st or --

21 **THE COURT:** You should be prepared to argue that as
22 well, okay. You have the briefing on that. There's no more
23 briefing on that. You can brief the summary judgment issue,
24 okay. You should do that. Just work out a schedule you're
25 comfortable with.

1 And then we'll have the hearing. Because I'm assuming the
2 plaintiffs -- there is going to be some fact dispute. Facebook
3 is going to say, "You all have to do it." And plaintiffs are
4 going to say, "We never did."

5 So it seems to me a hearing is inevitable. So we'll do
6 that. Okay. And then we'll resolve all of this within that
7 context. All right.

8 Now, what else is happening? Are you all doing anything
9 else right now?

10 **MS. GOLDMAN:** No, Your Honor. We've submitted the
11 case management statement according to the Court's order.

12 **THE COURT:** What about disclosures?

13 **MS. GOLDMAN:** The disclosures are due on January 8th,
14 Your Honor.

15 We would request that any additional discovery be held
16 until we resolve this threshold issue that the Court has
17 identified.

18 **THE COURT:** Well, why don't we -- do you have any
19 problem, Mr. Nguyen, just, sort of, focusing on this for the
20 moment?

21 **MR. NGUYEN:** Your Honor, we have provided -- we have
22 issued discovery in this case on December --

23 **THE COURT:** Let me ask. What is the fact discovery?
24 Let's assume you go forward under the BIPA. What do you need
25 to know? Isn't it just an up or down on whether it applies or

1 not?

2 **MR. NGUYEN:** Yes, Your Honor. But as we stated,
3 whether or not assent happened is a fact-specific inquiry. So
4 we've issued some discovery going to that, essentially how the
5 user interface looked.

6 **THE COURT:** Assent to the SRRs.

7 **MR. NGUYEN:** Correct, Your Honor.

8 **THE COURT:** We're going to do that in summary
9 judgment. Let's say we get past this and it comes out your
10 way. I was struggling to think what discovery you actually
11 need at that point.

12 **MR. NGUYEN:** It's not going to be voluminous, Your
13 Honor. In fact, our first discovery consisted of 7
14 interrogatories and 16 requests for production --

15 **THE COURT:** It's really an issue of law whether you
16 come within the BIPA or not. Right?

17 **MR. NGUYEN:** Correct, Your Honor. There may be some
18 residual issues about how the tag suggestion feature actually
19 works and things of this sort. But it's not going to be
20 voluminous.

21 **THE COURT:** So we could, if it goes forward, set this
22 for trial, if we need to, pretty soon. Right? We could do the
23 middle to the end of 2016.

24 **MR. NGUYEN:** Correct, Your Honor.

25 **THE COURT:** You have class cert.

1 **MR. NGUYEN:** Yes.

2 **THE COURT:** I'm not even sure there are any experts;
3 right?

4 **MR. NGUYEN:** I don't know if any experts will be
5 necessary, Your Honor. But I assume it's going to be pretty
6 much here's how the tag feature works and here's what the
7 statute is. I think it's going to be fairly limited, Your
8 Honor.

9 **THE COURT:** Do you agree, Ms. Goldman?

10 **MS. GOLDMAN:** I think it's very hard to say. We think
11 it's very clear that this case is going to be resolved on these
12 threshold legal issues.

13 **THE COURT:** Assume it's not for a moment. They've
14 raised a claim under BIPA. And they say, "We're within the
15 BIPA." What fact issues are going to go with that? They live
16 in Illinois and they're Facebook users. They've been tagged.
17 What's left?

18 **MS. GOLDMAN:** Well, whether Facebook functionally
19 complied with the statute. There could be any number of
20 factual issues. We don't think any of these come into play
21 because we think it's so clear that the statute is -- it's just
22 inapplicable to tag suggestions.

23 **THE COURT:** But those are all small issues.

24 Did Facebook more or less, or as you put it, functionally
25 comply? This is not a case where -- I'm not hearing from

1 either one to tell me otherwise. This is not a case where
2 there is going to be massive fact discovery on either side.
3 It's just not that kind of case.

4 **MR. NGUYEN:** Right. The issue is was there, you know,
5 informed written consent? And was there a public policy about
6 the, you know, facial -- biometric information being posted.

7 So the universe of documents, Your Honor, and the universe
8 of the proof is going to be fairly limited.

9 **THE COURT:** That seems right to me.

10 You two are getting along? Everybody is working
11 cooperatively?

12 **MS. GOLDMAN:** Yes, Your Honor.

13 **THE COURT:** All right. Work this out so we can get
14 lined up for the hearing. Work out -- get the discovery done.
15 Don't stand on deadlines. Just make it happen as much as you
16 can.

17 If you have a problem, I have very easy discovery dispute
18 resolution mechanisms. Make sure you read my order. All
19 right. And you can call me up and we'll work it out over the
20 phone.

21 I would like to get this done promptly. Work hard in
22 making that February 1st date work.

23 **MS. GOLDMAN:** If I could just ask the Court --

24 **THE COURT:** Yes.

25 **MS. GOLDMAN:** I will be at trial that day. And I

1 really would like to be at the hearing. I spent a lot of time
2 focusing --

3 **THE COURT:** Are you the lead person?

4 **MS. GOLDMAN:** At the trial I am the only --

5 **THE COURT:** For everything. Is this basically your
6 thing?

7 **MS. GOLDMAN:** It's Mr. Nadolenco and me, Your Honor.
8 But I am the person who has spent a great deal of time focusing
9 on all the choice of law issues.

10 **THE COURT:** I can't wait until March. You have a
11 trial starting January what?

12 **MS. GOLDMAN:** 25th.

13 **THE COURT:** In Massachusetts.

14 **MS. GOLDMAN:** Yes. But I expect it will be over by
15 February 14th, Your Honor.

16 **THE COURT:** I know people always expect that. But
17 trials are live shows. They never go the way anybody thinks.

18 **MS. GOLDMAN:** I understand, Your Honor.

19 **THE COURT:** All right. Mr. Nguyen, do you want to --
20 can you live with -- wait.

21 When does Eberhard start, Lisa?

22 When does Eberhard start, Jack? Do you know?

23 Okay. I think it starts the 22nd of February.

24 **THE CLERK:** You have Johnson on the 22nd.

25 **THE COURT:** I have Johnson on the 22nd?

1 **THE CLERK:** Yes.

2 **THE COURT:** Okay. I have a long trial starting in
3 February.

4 Is Eberhard before that?

5 **THE CLERK:** Let me check.
6 January 25th.

7 **THE COURT:** I thought I moved that.
8 Didn't we move Eberhard?

9 **LAW CLERK:** (Shakes head.)

10 **THE COURT:** Is it set for the 25th?

11 **THE CLERK:** Let me check the docket.

12 **THE COURT:** These are cases that I know are going to
13 go. So I've got to take a moment here.

14 **THE CLERK:** Yeah, you must have. The pretrial is set
15 for the 10th.

16 **THE COURT:** I thought I did. I think I scheduled them
17 for the 22nd with Mr. Johnson.

18 So can you bring up the 2016 calendar.

19 **THE CLERK:** What date?

20 **THE COURT:** Ms. Goldman, when are you done in
21 Massachusetts?

22 **MS. GOLDMAN:** I am confident that we will finish
23 sometime by February 14th. I think it should be by the 14th,
24 but I don't know for sure, Your Honor.

25 If necessary, I'm sure that one of my colleagues could

1 cover the hearing. I just would appreciate it if the Court
2 could wait a few extra weeks.

3 **THE COURT:** How about March 2nd?

4 **MR. NGUYEN:** What's the date?

5 **MS. GOLDMAN:** March 2nd.

6 **MR. NGUYEN:** March 2nd.

7 **THE CLERK:** That's a Wednesday, Your Honor.

8 **THE COURT:** I know. Wednesday is dark days during
9 trial. So I could accommodate you on the 2nd.

10 **MR. NGUYEN:** March 2nd, Your Honor?

11 **THE COURT:** Yeah.

12 **MR. NGUYEN:** Yes.

13 **THE COURT:** Probably will be after my law and motion.
14 I really don't see this as being more than half a day, unless
15 you disagree. All right.

16 **MS. GOLDMAN:** Understood, Your Honor. And thank you
17 very much. I appreciate it.

18 **THE COURT:** You should thank Mr. Nguyen too.

19 **MS. GOLDMAN:** Thank you.

20 **THE COURT:** March 2nd.

21 In the meantime, why don't you focus on this. And let's
22 not get too far afield before we get the choice of law issue
23 resolved, okay.

24 Anything else I can help you with?

25 **MS. GOLDMAN:** Thank you, Your Honor.

1 **MR. NGUYEN:** Thank you, Your Honor.

2 **MR. BERNSTEIN:** Thank you, Your Honor.

3 **MR. WILLIAMS:** Thank you, Your Honor.

4 (At 11:02 a.m. the proceedings were adjourned.)

5 - - - -

6
7
8
9 **CERTIFICATE OF REPORTER**

10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

12
13 DATE: Friday, December 18, 2015

14
15 *Katherine Sullivan*
16

17 _____
18 Katherine Powell Sullivan, CSR #5812, RMR, CRR
19 U.S. Court Reporter
20
21
22
23
24
25